

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
KEVIN BRUCE McCLURE,)	CASE NO. 05-32274 HCD
)	CHAPTER 7
)	
DEBTOR.)	

Appearances:

Jordan P. Williams, Esq., attorney for debtor, Thorne Grodnik LLP, 228 West High Street, Elkhart, Indiana 46516;

Bruce G. Arnold, Esq., attorney for creditor Mortgage Electronic Registration Systems, Inc., Feiwell & Hannoy, 251 North Illinois Street, Suite 1700, Indianapolis, Indiana 46204; and

Gary D. Boyn, Trustee, 121 West Franklin Street, Suite 400, Elkhart, Indiana 46516.

MEMORANDUM OF DECISION

At South Bend, Indiana, on November 7, 2005.

On August 4, 2005, the debtor Kevin Bruce McClure, by counsel, filed an Amended Motion to Avoid Judgment Liens under § 522(f)(1) ["Motion"]. Although no objection was filed, the court still must consider the debtor's Motion on its legal merits. After reviewing the Motion in light of the clear legal precedents regarding avoidance of liens, the court denies the debtor's Motion to avoid the judgment lien at issue.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(K) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 7052. Any

conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The debtor filed a voluntary chapter 7 bankruptcy petition on April 29, 2005. Three days before that filing, on April 26, 2005, the St. Joseph Superior Court in South Bend, Indiana, issued a judgment against the debtor and in favor of Mortgage Electronic Registration Systems, Inc. [“MERS”], which was the nominee for Aurora Loan Services, Inc. The judgment was in the amount of \$43,091.60, and it placed a lien on the debtor’s interest in three pieces of real estate that are the present focus of the debtor: (1) the debtor’s residence in Osceola, Indiana, which is comprised of two lots with two addresses, 58380 and 58390 Ash Road, Osceola, Indiana (“Osceola properties”); (2) a property on Lincolnway West, South Bend, Indiana (“Lincolnway West property”); and (3) a property in North Carolina (“North Carolina property”). In his Motion to Avoid Judgment Liens under § 522(f)(1), filed on June 16, 2005, and amended on August 4, 2005, the debtor sought to avoid the MERS judgment lien entered against him.

The debtor listed ten real properties on Schedule A, four of which are at issue in this motion. According to that schedule, the debtor and his non-filing spouse co-owned those four properties. Schedule A stated that the current market value of the property at 58380 Ash Road is \$180,000 and the amount of the secured claim is \$173,765.96. The current market value of the property at 58390 Ash Road is \$80,000 and the amount of the secured claim is \$18,500. The current market value of the North Carolina property is \$90,000 and the amount of the secured claim is \$86,427. The current market value of the Lincolnway West property is \$50,000 and the amount of the secured claim is \$40,067.

On Schedule C, the debtor claimed an exemption in the real estate at 58380 Ash Road. He stated on that schedule that the value of the claimed exemption is \$6,234.04 and that the current market value of the

property is \$6,234.04. The debtor did not claim an exemption on the Osceola property on 58390 Ash Road or on the North Carolina or Lincolnway West properties.

Discussion

The debtor asks the court to avoid the judgment lien of MERS because it impairs his statutory exemption. He brings a motion under 11 U.S.C. § 522(f)(1) to avoid MERS's lien on the properties he listed.

The statute provides that a

debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is —

(A) a judicial lien

11 U.S.C. § 522(f)(1)(A). A debtor has the burden of proof on all issues concerning lien avoidance. *See Schoonover v. Karr*, 285 B.R. 695, 700 (S.D. Ill. 2002), *aff'd*, 331 F.3d 575 (7th Cir. 2003); *see also Soost v. NAH, Inc. (In re Soost)*, 262 B.R. 68,74 (B.A.P. 8th Cir. 2001) (stating that the movant “bears the burden of proving by a preponderance of the evidence all the elements required to establish his entitlement to lien avoidance under section 522(f)”). To prevail on a motion for avoiding a lien, therefore, a debtor has the burden of proving these statutory requirements: “(1) the lien is a judicial lien; (2) the debtor has claimed an exemption in the property under Section 522; (3) the lien impairs the exemption; and (4) the debtor has an interest in the property.” *In re Elmes*, 289 B.R. 100, 108 (Bankr. N.D. Ill. 2003) (citing *In re Johnson*, 53 B.R. 919, 922 (Bankr. N.D. Ill. 1985)); *see also, e.g., Goswami v. MTC Distributing (In re Goswami)*, 304 B.R. 386, 390-91 (9th Cir. B.A.P. 2003) (quoting *In re Mohring*, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992)).

In this case, the debtor admits that MERS holds a judgment lien in the amount of \$43,091.60 against the debtor's properties. It is accepted without challenge that the judgment qualifies as a judicial lien as defined under § 101(36) of the Bankruptcy Code. The first prerequisite thus is met. However, with respect to the property at 58390 Ash Road in Osceola and to the North Carolina and Lincolnway West properties, the second

requirement is not met. The debtor claimed an exemption only in the real estate located at 58380 Ash Road, Osceola, Indiana. He did not claim an exemption in the other three properties.

“[D]ebtors may not avoid judicial liens upon property without actually claiming an exemption in that property.” *In re Berryhill*, 254 B.R. 242, 244 (Bankr. N.D. Ind. 2000). Without a claim of exemption, no exemption can be deemed to be impaired by a lien. *See In re Mukhi*, 246 B.R. 859, 862 (Bankr. N.D. Ill. 2000) (requiring that a debtor claim an exemption in the subject property as a prerequisite to lien avoidance); *cf. In re Paepflow*, 972 F.2d 730, 737 (7th Cir. 1992) (“[C]ongress intended [tenancy by the] entirety property to enter the bankruptcy estate and to pass out of the estate if subject to an exemption, and if claimed by the debtor on his or her bankruptcy schedules.”). It is clear that MERS’s judicial lien on those properties cannot impair unclaimed exemptions. The court finds that the debtor has failed to meet his burden, under § 522(f)(1), of proving that the lien may be avoided on the properties that were not claimed as exempt. The motion to avoid lien therefore is denied with respect to the properties at 58390 Ash Road, Osceola; North Carolina; and Lincolnway West.

The court turns next to the property that the debtor did claim as exempt, namely his residence. The debtor listed both 58380 and 58390 Ash Road in Osceola, Indiana, as residential real estate. As explained above, however, the judicial lien on 58390 Ash Road cannot be avoided on exemption impairment grounds. The court now considers whether the lien on 58380 Ash Road can be avoided if it impairs the exemption.

Because a judicial lien may interfere with the “fresh start” the Bankruptcy Code gives debtors, it may be avoided under § 522(f) to the extent it “impairs an exemption to which the debtor would have been entitled.” § 522(f)(1). An Indiana debtor is entitled to an exemption in his residence under Indiana Code § 34-55-10-2(b)(2), which exempts up to \$7,500 in “[r]eal estate or personal property constituting the personal or family

residence of the judgment debtor.”¹ The debtor claimed an exemption of \$6,234.04. Section 522(f)(2)(A) sets forth a formula for determining whether a lien impairs an exemption to which the debtor would be entitled:

[A] lien shall be considered to impair an exemption to the extent that the sum of –

- (i) the lien;
- (ii) all other liens on the property; and
- (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor’s interest in the property would have in the absence of any liens.

11 U.S.C. § 522(f)(2)(A).

In his Motion, the debtor stated that liens on his residence are held by Farm Bureau Credit Union (in the amount of \$2,907.94) and First Source Bank (in the amount of \$26,315.13). The debtor reaffirmed those obligations. *See* R. 30, 37. He now seeks to avoid the judicial lien of MERS in the amount of \$43,091.60. In this case, the court aggregates the liens on the property and the exemption amount:

MERS judicial lien:	\$ 43,091.60
lien of Farm Bureau Credit Union:	2,907.94
lien of First Source Bank:	26,315.13
statutory exemption amount:	<u>7,500.00</u>
<u>TOTAL</u>	<u>\$ 79,814.67</u>

The value of the debtor’s interest in the property is \$180,000. Because the sum of the liens and the exemption, \$79,814.67, is less than the value of the debtor’s property, \$180,000, the court finds that the debtor has equity in the property and that the lien does not impair the exemption. *See, e.g., Garran v. S.M.S. Fin’l V (In*

¹ Indiana Code § 34-55-10-2 was amended on July 1, 2005, by Public Law 179-2005. It increased the amounts of the exemptions. However, the previous statute was in effect on the date of the debtor’s petition, April 29, 2005. *See Little v. Reaves (In re Reaves)*, 285 F.3d 1152, 1156 (9th Cir. 2002) (stating that a debtor’s exemption rights are determined on the date of the bankruptcy petition); *In re Burns*, 218 B.R. 897, 898 (Bankr. N.D. Ind. 1998) (same).

re Garran), 338 F.3d 1, 6 (1st Cir. 2003); *Lindsey v. Spagnol (In re Lindsey)*, 313 B.R. 390, 395 (Bankr. W.D. Pa. 2004). As a result, the judicial lien of MERS is not avoidable.

In conclusion, the court finds that the debtor has failed to meet his burden of proving that the lien may be avoided on (1) the properties that were not claimed as exempt (the properties at 58390 Ash Road, Osceola; North Carolina; and Lincolnway West) and (2) on the property at 58380 Ash Road in Osceola, in which he claimed an exemption. Accordingly, it denies the debtor's Motion.

Conclusion

For the reasons stated above, the court denies the debtor's Amended Motion to Avoid Judgment Liens under § 522(f)(1).

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT